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"THE ILLINOIS CONFERENCE ON THE REFORM OF THE LAW OF PROCEDURE AND PRACTICE"—A MODEL ACT FOR OTHER STATES TO CONSIDER.

The editors of this journal have been observing with appreciative interest the movement in Illinois for the reform of procedure. So, when we were kindly invited by the Secretary of the Illinois State Bar Association to be in attendance at its meeting in Springfield, on February 16, 1911, to discuss the report of a committee of fifteen, appointed, five each, by the governor, the supreme court and the executive committee of the Illinois Conference on the Reform of the Law of Procedure and Practice, one of us gladly became "a looker-on in Venice."

We know we would greatly popularize our campaign for reform of procedure and practice, could we transfer to our pages some of the excellent things said, and exhibit the spirit of approval, which delighted us on our visit. It is to be remembered, however, that Illinois seems not so very much a laggard in effort to reform its procedure and practice as other states, and its courts are not nearly so far behind in the disposition of causes as theirs are. It was as late as June, 1907, that a very comprehensive, progressive "act in relation to practice and procedure in courts of record" was enacted by the Illinois legislature. Whatever opposition, therefore, there is against the committee's report, is not by those, who are content with antiquated methods, but the bar seems, so far as our observation went, to be all reformers.

The report submitted by the committee was a proposal to amend certain sections of the practice act of 1907. The changes it proposes embrace seven important things: Forbidding the bringing of suits or the interposing of defenses or counterclaims, except in good faith; elimination of all but actually controverted issues in trials; settling of instructions before they are given to the jury; confinement of new trials to what has been affected by error; consideration only of error, which *affirmatively* appears to have injuriously affected the substantial rights of a complaining party, and vesting the supreme court with power to make rules of courts relating to pleadings, practice and procedure in aid of the practice act.

Taking these purposes severally, we find that plaintiff begins a suit by summons and at least ten days before it is returnable he must file his declaration, to which he shall attach an affidavit, verified by himself or agent, or some other person with knowledge of the facts, stating that he has good reason to believe, and does believe, that the facts set forth in the declaration are true and the suit is prosecuted in good faith. He must also swear in all cases not of unliquidated damages, how much is due. As along the line of good faith and as deterrent of defense not in good faith, plaintiff may file with his declaration written interrogatories to defendant or to any one of several defendants to be answered by him or them under oath.

If defendant pleads he shall attach to his plea or pleas, an affidavit by himself or someone cognizant of the facts that he has good reason to believe, and does believe, that the facts set forth in his plea, or pleas, are true, and that his defense is interposed in good faith and not for delay. He also has the right to file with his plea, or pleas, written interrogatories to be answered by plaintiff under oath.

If these interrogatories are not met by "clear, responsive and unevasive answers," the pleading of the offending party is stricken from the files and judgment rendered "as in case of non-suit or *nil dicit*."

When they are answered, "either party may at any time move the court to enter judgment upon the pleadings and interrogatories and answers thereto." We further ascertain that no answer shall be "used or admitted as evidence against" the party eliciting same, but he may introduce the answers he elicits or any of them at the trial and "any fact admitted by the an-

swered interrogatories" shall be taken as an admission of the greatest solemnity.

Under these circumstances, where the conscience of each litigant may be probed as to every step he takes, speculative litigation or sham defenses would be little likely to cumber or obstruct the orderly pathway to justice.

Our statement is that one of the objects aimed at was the elimination of everything but questions actually in dispute between the parties and possibly there can be no more conclusive way of demonstrating this than by again referring to what is said about interrogatories and answers, and the effect of the latter as admissions.

But this idea also is enforced by specific directions where the effect of the answers does not go to the entire controversy. In such case it is said, that, if they show a defense is only to a portion of plaintiff's demand, or plaintiff's defense to a counter-claim is only to a portion thereof, the litigation shall proceed as to the balance of the demand or counter-claim, as the case may be.

We imagine that not many cases, where there are no radical differences as to the facts, would ever get beyond a motion for judgment by plaintiff or defendant, under such a system as this. As the matter now stands, whether counsel for respective parties disagree either as to the law only, or as to the facts only, each and either *en masse*, the case in most jurisdictions goes to the jury, there to be smothered by a lot of irrelevant matter or mingling the relevant with the irrelevant in hopeless confusion.

The proposition of the committee is that the judge must submit his proposed "charge" to the jury to counsel and give them an opportunity in the absence of the jury and before it is read to them, to state specifically their objections to it and to ask him to embody requested instructions in that charge. Thus instructions stand some chance of being settled advisedly.

That word "charge" sounds "good" to us. If there is anything in legal machinery that seems less calculated to aid jurors in the consideration of a case than another, it is a batch of requested instructions which are handed up by counsel and read to an anxious jury. They are drawn by counsel, not to give a connected view of the case, but each request is for the application of a proposition of law to a partial view of things. In drafting the request, counsel falls either short of the limit he is entitled to go, for fear the court may reject his request, or he strains a point and induces error. But whether he does one or another thing, the jury are not led along in the way of a connected charge, logically constructed, to view the case as a whole.

We noticed in the discussion that we attended, that some of the bar objected to the provision that "no objections or exceptions shall be considered on review except those specifically called to the attention of the court." It was claimed that a trial was for the purpose of administering justice and not for a gladiatorial battle between attorneys, and that, when a case is on appeal, the court appealed to should not be restricted to the record in this way.

While all this may be conceded and the general drift of the amendments the committee proposes is to this end, yet it seems to us, that this provision is merely one out of abundance of caution, and that anything short of what it says would be opposed to the constitutional guarantee of trial by jury. The amendments are all in the direction of imposing terms on appellants, except where they apply to both parties in the court of original jurisdiction. We do not see how under our ordinary constitutional guarantees, a single advantage gained by a party in a court of original jurisdiction, so far as won in a case triable by jury, can be impaired through appeal therefrom by his adversary.

Regarding the question of error which will affect a result, we find in the committee's draft, both in the clause in the sections as to motions for new trial and review by appellate courts, what we deem very apt language. Our courts have been struggling with the question what is harmless error, and the presumption that all error is harmless, and the federal courts,

representing the extreme view, have adopted the ruling, that that error is to be deemed prejudicial which *could*, not which *might*, have affected the result. As we regard the language, the committee recommends, the error must be that which shows affirmatively that it did work prejudice. Even then a new trial is not to be granted, unless it is probable that it will produce a different result. This we conceive within legislative competency to declare, because the right to move for a new trial or the right of appeal from an adverse result is statutory and it may be hedged about with whatsoever conditions the legislature sees fit to impose.

One of the most excellent things, to our mind, the committee proposes, is that no new trial shall go beyond a rehearing of that which has been affected by error. Why, as we have placed jury trial on a constitutional pedestal, we do not consider inviolable whatever a jury uninfluenced by error decides, is one of the seeming inconsistencies in American jurisprudence we have never been able to solve.

As to what the committee proposes about the supreme court of the state making rules and regulations about pleading and practice, so as to carry into practical effect the Illinois practice act, we beg to refer our readers to 71 Cent. L. J. 327 and 365, where we advocated as strongly as we knew how, this duty being devolved on the courts. An esteemed contributor in our symposium on reform in procedure advocates this plan. 72 Cent. L. J. 117. We and he think that bar and bench will co-operate thoroughly in such a great work. Indeed, the committee's plan invites them to do so, and gives the bar opportunity to offer suggestions and objections for the court's consideration. It proposes that no rule or regulation made by the supreme court shall go into effect for sixty days and that objections submitted in that interval shall be considered by the court.

We respectfully ask, in what way may responsibility for ineffective administration of justice be more thoroughly cast upon the courts? This is practically the plan of the English Judicature Act, which is working to the admiration of all who have considered the subject. That we cannot go the full length of that act is a constitutional difficulty, but we congratulate the Illinois Committee of Fifteen in proposing a solution that would prevent this obstacle from barring us from so great a part of the benefits that act affords. Rules by a court combine flexibility with precision. They may be corrected easily wherein application may show they are defective, and additionally they guide us to solving properly difficulties under any practice act which it would be the function of the rules to assist. When difficulties in the practice act are discovered, the legislature may correct them.

In addition, let us suggest, that this is a far better plan to secure a permanent system, than that of resort to legislative tinkering with practice acts not thus aided. It would scarcely be in the power of legislative lawyers to secure the enactment of new practice acts or to be amending, by piecemeal, existing acts, where they may have particular axes to grind. A scientific study would be secured in the perfection of our procedure and the habit would come into vogue of looking to supreme courts for recommendations in changes in practice and procedure. These courts then would be held responsible, if procedure is ineffective. Who is responsible now? C.

NOTES OF IMPORTANT DECISIONS

CONSTITUTIONAL LAW—LOST RECORDS ACT OF CALIFORNIA TO CURE CONFUSION AND UNCERTAINTY IN LAND TITLES.—The case of American Land Co. v. Zeiss, 31 Sup. Ct. 200 considers the constitutionality of legislation by California which had its origin in an effort to allay confusion in land titles arising out of the San Francisco earthquake. This legislation authorized the establishment and quieting of title to real property, in case of loss or destruction of public records, by an action in rem, to be brought by a person in the actual and peaceable possession against all known claimants whose names he may ascertain with reasonable diligence, with constructive service by publication

against non-residents and unknown owners, considered along with another statute allowing any person interested and having no notice of any decree in a suit under such act to come in within a year after its rendition and upon cause shown procuring its vacation and being allowed to answer.

The Chief Justice, however, first discusses the lost records act independently of the other provision, which the state court held should be considered as inhering in the statute, and reaches the conclusion that in itself there was no repugnancy to the 14th Amendment.

He first considers the power of the state in respect to the allaying of such confusion as the State Supreme Court said was a "matter of common knowledge," and says: "As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that government possesses the power to remedy the confusion and uncertainty as to registered titles arising from a disaster like that described by the court below. * * * Manifestly under circumstances like these here presented it applies * * * in the case of unknown claimants. Undisclosed and unknown claimants are, to say the least, as dangerous to the stability of titles as other classes."

There being a situation then, within legislative authority, the act is looked to to see if reasonably proper safeguards are provided with respect to the rights of others. It is remarked by the Chief Justice that a suit to quiet title can only be brought by one who claiming an interest in real estate is by himself a tenant "in the actual and peaceable possession" of that property. This shows that no one can be deprived of his property who "has not gone out of possession of such property" and allowed another to acquire possession, or having a claim has so entirely omitted to give notice of it as to enable another to truthfully make affidavit that one in possession has no knowledge of his claim. It is said by the Chief Justice that every possibility of injustice is not to be the test of a safeguard in a matter where public interest authorizes action being or not within the 14th Amendment.

He says: "To argue that the provisions of the statute are repugnant to due process of law because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings, is in effect to deny the power of the state to deal with the subject."

The drift in the Supreme Court seems more and more to leave the state's police power free. The due process of law clause and the 14th Amendment are merely barriers against arbitrary unreasonable assaults upon private right. If the public good requires that private ownership or individual right may fortuitously be touched or even sacrificed, measures looking to that good are not to be thwarted. Especially when generally one's private right may be protected by a reasonable regard for his own interests, his neglect is not to stand in the way of what is for the general good.

BANKRUPTCY—INTEREST ON SECURED DEBTS SUBSEQUENT TO ADJUDICATION.—It was held by District Court for the Northern District of New York and this holding was affirmed by Circuit Court of Appeals, that where secured creditors sold their security sometime after their debtor was adjudged a bankrupt they could, where the proceeds were insufficient to pay their debts, apply the proceeds first to interest accrued since the filing of the petition and the balance to principal and prove up for the remainder of their debts. This holding the supreme court reverses, except it allows interest and dividends earned by the securities after filing of the petition to be first applied to interest on their debt. Sexton Trustee v. Dreyfus, 31 Sup. Ct. 256.

Justice Holmes, speaking for the court, says: "For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commissions. * * * This rule was applied to mortgages as well as unsecured debts * * * and notwithstanding occasional doubts, it has been applied with the prevailing assent of the English judges ever since. * * * The rule was laid down not because of the words of the statute, but as a fundamental principle. We take our bankruptcy system from England and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state. No one doubts that interest on unsecured debts stops."

This argumentation seems to us wholly academic, though arriving at a correct result. There was hardly any question really about distinction between secured and unsecured debts—especially as the court says that whatever was earned by the securities goes to the creditor. This preserves his security in its fullness. Beyond that he is really unsecured, so far as interest is concerned, if his securities are not as valuable as the amount of the debt,

but only partially secured. The lower courts which are reversed were giving the creditor an advantage beyond what the statute provided for, that is, both to the extent he was secured and beyond that. Suppose for example, one owned a debt for $1,000 secured by a bond of the value of $100. Certainly his debt would be unsecured as to $900 thereof, and he therefore ought not to collect interest on $1,000, even if he might on $100.The fault of the lower courts was in adopting a literal interpretation.

HARMLESS ERROR.*

There is no dispute in this country about the doctrine that error in a trial, which works no prejudice to one complaining thereof, cannot be invoked as a basis for re-examination of a result. In perhaps every state and federal court of this country, this doctrine, in one form or another, and with much iteration in each, has been announced. Such error comes under the maxim *de mimimis non curat lex.*

Possibly, also, there is little, if any, dispute concerning the standpoint from which the existence or non-existence of prejudice is to be viewed, and that standpoint is, that in a trial a party must have conceded to him the right to conduct his action or defense in whatsoever way the law allows, and any error which prevents such conduct is prejudicial, unless independently of its commission, it plainly appears that he either has no right of action or no ground of defense, as the case may be. This rebuttal of prejudice is also shown in such decisions as declare that a judgment for defendant should not be disturbed, where plaintiff is not entitled to recover in any event, or that the decision is correct on the merits, or that a defense is generally baseless and insufficient, of which see cases *passim.*

The trouble arises more in the attitudes of courts when they come to consider whether error has affected, sufficiently to demand a retrial, the right of a party to conduct his action or defense, and whether it has been shown, despite such error, that he had no substantial right of action or defense, as the case may be.

Cases in Which Proof Shows No Action or No Defense.—Taking the matter up in something of an inverse order, as last above stated, we will endeavor to ascertain whether the rebuttal of prejudice need go to the extent of showing, that it ought to appear that the trial court should have instructed for defendant as to plaintiff's action or for plaintiff as to defendant's defense, or *pro tanto* considering the error complained of. Refusal of a new trial, because prejudice from error is overcome, does not take into account, or at least need not take into account, any views about presumption of prejudice from error and whether the burden is on appellant to show prejudice. It cuts from under all claim of prejudice the possibility of harm by saying there is nothing for prejudice to affect.

The cases, therefore, which hold that the losing party should not have had any contention by way of action or defense decided in his favor need not be adverted to, for, according to Alabama practice,[1] there should have been an affirmative charge in favor of the party not complaining, applying such rule to an entire action or defense as to what the error, e. g. a claim of set-off, affects.[2] And so those cases or the particular issues therein as to which a favorable verdict in favor of a complaining party would not be allowed to stand.[3] Much authority could be cited to these propositions, but merely a few illustrative cases are referred to.

Cases in Which Verdict for Either Party Would Be Sustained.—It may, in view of what has gone before, be said, that it is only where a losing party could claim that a verdict in his favor would stand, that any

*This is our second article on Reform in Procedure.

(1) Leatherbury v. Spotswood Turner & Co., 145 Ala. 655, 39 So. 588; Adler v. Prestwood, 122 Ala. 367, 24 So. 999; McAlester Mfg. Co. v. Florence Cotton & Iron Co., 128 Ala. 240, 30 So. 632.

(2) Brock v. Forbes, 126 Ala. 319, 28 So. 590.

(3) New York, N. H. & H. R. Co. v. O'Leary, 93 F. 737, 35 C. C. A. 562; W. W. Kimball & Co. v. Redfield, 33 Or. 294, 54 Pac. 216; Laughter v. Laughter, 21 Tex. Civ. App. 414, 52 S. W. 987; Ollis v. Orr, 6 Idaho 474, 56 Pac. 162; McCroskey v. Mills, 32 Colo. 271, 75 Pac. 910; People's Sav. Bank v. Smith, 114 Ga. 185, 39 S. E. 920.

error against him in the course of a trial may be complained of at all. Not even, then, may he successfully complain, unless the error interfered with a full and fair consideration of his action or defense and that interference was not nullified or negatived in the course of the trial. It is in these cases only in which error may be properly said to be harmless or prejudicial. In all others there being nothing upon which prejudice can operate, its presence or absence is a mere figment of the mind.

Presumption of Prejudice from Error.—There are cases which announce as a principle of law, that error is presumed to be prejudicial to the interests of him against whom it is committed. As strong an expression of that principle as we have seen given is by the federal Supreme Court, which said: "While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt, that the error complained of did not and could not have prejudiced the rights of the party duly objecting."[4] A California court has said, in effect, error would not be deemed harmless unless it appears that no harm could have been or was done thereby and it does not suffice to show that probably no harm was done.[5]

It has also been stated, that the admission of illegal evidence requires a reversal, if it cannot be said what effect it may have had on the minds of the jury.[6] So as to the exclusion of competent evidence there is presumption of prejudice unless it clearly appears it was not of importance to the party offering it, where the exclusion was erroneous.[7]

On the other hand expression of the rule has been stated with much more mildness. Where the error referred to procedure, such as giving the wrong party the right to open and close, prejudice will not be presumed, but must be shown,[8] but as against this the Supreme Court of Missouri appears opposed, in holding that the wrongful overruling of a challenge for cause will be deemed prejudicial, whether or not the challenger has exhausted his challenges.[9] And it has been said as to immaterial and irrelevant evidence, that on its face it must appear to be calculated to have an improper influence.[10]

In regard to instructions erroneously given or refused we find similar opposition in expression about presumption of prejudice. In Arkansas it is stated, with regard to refusing a proper requested instruction and the giving of an erroneous instruction, that prejudice is presumed.[11] Also, the federal courts say it must be said, that there is prejudicial error, though there be two theories, upon either of which the verdict could stand, if there was an erroneous instruction regarding one of them, if there was no way of telling which theory the jury adopted.[12] The same result ensues from conflicting instructions, as it cannot be said which the jury followed. And even misleading instruction presumes prejudice, it only being necessary to see that it could, not did, mislead.[13]

Some courts adopt a less stringent application of the rule or confine it more according to the nature of the case in which prejudice is claimed from error. Thus it

(4) Railroad Co. v. O'Reilly, 158 U. S. 334. See also Deery v. Cary, 5 Wall. 795; Norfolk v. Traction Co., 174 Fed. 607, 98 C. C. A. 453.

(5) Taggart v. Rosch, 117 Cal. XVII, 48 Pac. 1092. See also Thomas v. Carey, 26 Colo. 485, 58 Pac. 1093.

(6) Norfolk & W. Ry. Co. v. Briggs, 103 Va. 105, 48 S. E. 721.

(7) Henry v. Colo. Land & Water Co., 10 Colo. App. 14, 51 Pac. 90; Cook v. McAleenan, 41 N. Y. Supp. 479, 18 Misc. Rep. 219.

(8) Farmer v. Norton, 129 Iowa 88, 105 N. W. 371.

(9) Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354.

(10) So. Mut. Ins. Co., 29 Gratt. 255; International & G. R. Co. v. Foster, 26 Tex. Civ. App. 497, 63 S. W. 952; Mo., K. & T. R. Co. v. Flood, 35 Tex. Civ. App. 197, 79 S. W. 1106.

(11) St. Louis & S. F. R. Co. v. Crabtree, 69 Ark. 134, 62 S. W. 647; Neal v. Brandon, 70 Ark. 79, 66 S. W. 200.

(12) Durant Min. Co. v. Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252. See also Bruce v. Horn, 11 Colo. App. 316, 52 Pac. 1036; Strever v. Chicago & N. W. R. Co., 106 Iowa 137, 76 N. W. 513. This principle is also applied to independent causes of action in different courts, if an instruction is erroneous under either and it is difficult to say under which court the finding was made. Green v. McGowan, 7 Ky. Law Rep. 680.

(13) Railroad v. Greer, 22 Tex. Civ. App. 5, 53 S. W. 58; Robinson v. Lowe, 56 W. Va. 308, 49 S. E. 250.

has been held that where there was an "unusually fair trial" free from passion or prejudice and substantial justice appears to have been done, the errors must be very grave and material for the findings to be set aside.[14] In Wisconsin it was held that improper evidence should not cause reversal, unless it clearly appears that but for its admission the finding would have been different.[15]

Error Harmless pro Tanto and Prejudicial Specially.—The particular evil in American administration of law, generally speaking, is that, while our facilities in the way of presenting, *verbatim et literatim*, a complete record of a trial in a court appealed from, yet errors wherein they are certainly harmless are taken to be generally prejudicial and overturning everything that has been done in the trial court. This is exemplified in ruling generally that a new trial should be awarded where there is error and injury—thus not confining the injury to its scope.[16] Thus take the case where the cross-examination of a particular witness is denied or unduly restricted.[17] This case argues on broad lines about the right to free and full cross-examination, which being denied is presumed to work injury, and though in the case the cross-examination may have been concerning that which went to the root of the whole case, a wide statement of this kind is misleading in tendency. In a Nebraska case the evidence held incompetent and prejudicial related merely to the question of damages and yet the case was remanded generally for a new trial.[18] In a Missouri case we find the scope of the prejudice caused by certain incompetent evidence stated i. e. its effect on the amount of recovery,[19] and yet the cause was reversed and remanded for a new trial generally.

But it is unnecessary to go into extensive citation of cases on this question, for every case, in which a reversal and remand is directed, unless a plaintiff will consent to an affirmance with a reduction of damages, goes upon this theory. In North Carolina we find the partial new trial theory the rule, and occasionally resorted to in other states.[20]

What is Meant by Prejudice is Presumed and the Converse,—Prejudice Must Be Shown.—There is nothing more firmly seated, than that a juror is not allowed to impeach his own verdict. Affidavits may be submitted for the purpose of bringing to the attention of the court matters of which it would otherwise have no knowledge and from which inference of prejudice may be drawn. These are that a juror was disqualified *propter affectum*; or that he had expressed an opinion; or that some irregularity had occurred in the impanelling, or custody of or consideration by the jury. But what took place *in facie curiae* or constituted a part of the record is not to be thus shown. But all of these things are to be judged of as to their tendency and not as any trior of the facts may say what was their effect.

Therefore, it may be thought, that there is really no presumption one way or the other. The great majority of American courts say, if an error might or could have worked material harm, it should cause reversal. If it is clear that it did not, it is harmless. And these conclusions are to be drawn from a reading—a scrutiny—of the record. And so with these merely viewing prejudice more leniently.

It may be true, that here is a wide open door and that no very definite prediction may always be indulged as to the outcome of a case, when reversal is claimed and resisted for error alleged to be prejudicial. The way in which a case has been tried

(14) Pittsburg v. Broderson, 10 Kan. App. 430, 62 Pac. 51. See also Hill v. Braughman, 20 Ky. Law Rep. 301, 62 Pac. 5.

(15) Harrigan v. Gilchrist, 121 Wis. 127, 39 N. W. 909.

(16) First Nat. Bank v. Am. Sugar Refining Co., 120 Ga. 711, 48 S. E. 326.

(17) Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180.

(18) Bee Pub. Co. v. World Pub. Co., 62 Neb. 732, 87 N W. 945.

(19) Barker v. Railroad, 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646; Cerney v. Paxton & Gallagher Co. (Neb.) 68 Cent. L. J. 160.

(20) 68 Cent. L. Journal 161. Where many cases are cited from that and other states. See also Hartman v. Warner, 75 Conn. 197, 52 Atl. 719.

may eliminate the error. As for example where there is a trial on the merits under a plea of general issue, and a general judgment for defendant on that plea, that demurrers to special pleas were erroneously overruled will be deemed harmless.[21] If the final result arising out of special findings of fact may show that the tendency of prejudice in a particular direction is negatived, it will not be considered.[22]

The Growth of Decisions on the Line of Harmless and Prejudicial Error.—The absolute fullness of records—their complete reproduction in appellate tribunals as to everything except visual observation of witnesses and the hearing of their voices places appellate tribunals in a vastly different situation now from where they were fifty years ago. A transcript of the evidence is greatly different than depending on the "notes" of the trial judge, or a narrative statement of what was testified to, however diligently it was attempted to keep track of everything that was said and done. The minutiae now produced in a record enable opinions to quote the very words of witnesses, when the older cases had to content themselves with the substance of what they were understood to say. If one, however, will indulge himself with a fairly critical glance at "harmless error" in the Century Digest covering more than a hundred years of American decision in comparison with what he will find on the same subject in the Decennial Edition of the American Digest, he will discover that the ten year grist of cases on this line exceeds all that has gone before. In passing, we might also say, that, in general bulk, the number of cases under the title, "Appeal and Error" for the ten years falls little below that of the entire period of hundred years that went before.

(21) Shahan v. Railroad, 115 Ala. 181, 22 So. 443, 67 Am. St. Rep. 20.

(22) Reddick v. Keesling, 129 Ind. 128, 28 N. E. 316; Gallimore v. Brewer, 22 Ky. Law Rep. 296, 57 S. W. 253; Fowles v. Rupert, 143 Mich. 246, 106 N. W. 873; Smith v. Coutt, 20 Tex. Civ. App. 558, 50 S. W. 167; Loveland v Connors, 121 Wis. 28, 98 N. W. 933, which cases either show error excluded by special findings or that the final result was independently reached.

If our legislation has produced this wonderful accumulation it is sadly at fault. If our facilities in the production of perfect records have done so, it would seem that we might have been better off without them.

These perfect records seem especially to have put judicial investigation on the line of search for error and to have coined phrases which are like stereotypes in decision. "We find no reversible error and the case is affirmed;" "the verdict is for the right party;" "the case was fairly tried and the verdict is supported by the evidence," all these and others seem to invite other litigants to try their fortunes before appellate tribunals should ill luck attend them in lower courts, for they are *impression,* and not *principle,* decisions.

And yet as often as these courts seem averse to allow conclusiveness to rest where the least error occurs, still in almost the same breath, with dogmatic positiveness, they will say, where there was no error in a trial, that a recovery is too large. In other words, they are ready to state the precise effect of competent evidence, but refuse to declare the precise influence of that which is incompetent.

Possibly they are right under the latter position, because of the constitutional jealousy in respect to jury trials, but why this jealousy should not operate as forcefully in behalf of a respondent in an appeal as an appellant is something of a refinement my mind has not been able fully to grasp. But even, if there be substantial basis for the distinction, I would still be at a loss to understand why, if the jury's judgment is only at fault as to damages, it should be nullified in its entirety, and what would seem like a vested right accruing to plaintiff practically confiscated for no fault of himself or his attorney.

The Reach of Statutes in Decreasing Remands for Error.—I have just suggested that constitutional jealousy in regard to the inviolability of jury trial governs American courts in their consideration of the question whether error is harmless or prejudicial. This is the theory, but I do not believe it

can be claimed, that the history of any appellate court in this country shows entire consistency in its application. But there is another principle quite universally recognized even in jurisdictions where there is constitutional guarantee of jury trial—and this means a fair jury trial. This principle is that only in such cases from the decision of which a constitution specifically provides for an appeal is an appeal other than of statutory creation. This implies, as has often been held, that the statute may impose whatsoever conditions to its taking a legislature sees fit to impose.

Therefore it seems to me that the statute may authorize an appellate court to adjudicate as against appellant as fully as the *nisi prius* court could, but it cannot impair an iota, in jury trial cases, the rights of appellee except for prejudicial error. But prejudicial error may be severely limited in his favor.

Let me illustrate by the bill proposed by the American Bar Association to Congress: "To regulate the judicial procedure of the courts of the United States." It proposes to eliminate from consideration in an appellate court all error except that which "has resulted in a miscarriage of justice."[23] I do not much relish the quoted language, but take it to intend to say, that but for the error a verdict might or even probably would have been for the other party, yet it should stand in an appellate court, if there is evidence to support it. If it does not mean this, it advances little from where we now stand. It is, however, a miscarriage of justice, in one sense, to turn a finding from what it would have been but for error, whether there is support for the other event or not, or even if the latter should happen to be the correct event.

Nevertheless the legislature has the right to say this much, because it is no more than saying to an appellant that he has had his day in court and it is a matter of grace to hear him further.

Instead of such a provision, I would say that the proposed bill should provide, that on an appeal the respondent's right to a jury trial on questions of fact should never be impaired without his consent, and, if error which militated against appellant's right to a fair jury trial is found in the record, the court should nevertheless not remand without respondent being first allowed to demand that the appellate court render the verdict it thinks the jury should have rendered.

To make a provision of this kind operative in every case it should be made obligatory on appellant to furnish a record as complete as in the court below or the judgment should be affirmed, unless respondent stipulates that what is before the court is sufficient for a disposition of the case.

In addition to this, remands could be lessened by requiring appellate courts to disregard as prejudicial all merely technical error and all errors in procedure, which do not palpably interfere with the function of the jury in its consideration of facts. In other words, to the principle that there is presumption of prejudice from error, I would add that it extends only to that which could or might be an invasion of the province of the jury in its findings of fact. As to other error, every presumption should be the other way.

I can conceive that respondents in whose favor there was error below might sometimes prefer remands to having the appellate tribunal decide a cause, but if they do, at least, neither party could complain, for this is what the appellant asks for and what his adversary grants. Nevertheless, the speculative feature in appeals would be largely eliminated, for if an appellant has really no meritorious action or defense he will believe respondent will in the court of

(23) Instead of the words "has resulted in a miscarriage of justice," the act as passed by the House of Representatives and at this writing pending before the Senate, provides, that "it shall appear that the error complained of has injuriously affected the substantial rights of the parties." This language we think much preferable, and especially needed in the federal courts which reverses if error could, not might, have affected the result. I understand this change requires these courts to rule that substantial rights, were, not might, have been affected. See 72 Cent. L. J. 123, for copy of this act.

appeal terminate the litigation, possibly with a larger judgment in his favor than that appealed from, in the meantime securing its payment. I think the particularly desirable thing about appellate courts is to have them end, instead of prolong, litigation.

N. C. COLLIER.

St. Louis, Mo.

BILLS AND NOTES—NEGOTIATION.

AURORA STATE BANK v. HAYES-EAMES ELEVATOR CO. et al.

Supreme Court of Nebraska. Jan. 9, 1911. 129 N. W. 279.

Payment by a bank of a check drawn upon it, in the usual course and in the absence of fraud or mistake of fact, extinguishes the instrument, and the bank by thereafter putting it in circulation cannot create a liability thereon against its maker or prior indorser.

BARNES, J. Action by the Aurora State Bank against the Hayes-Eames Elevator Company, M. Wagner, O. E. Bedell, and A. M. Glover, upon a written instrument which reads as follows:

"No. 541. Giltner, Neb. 2/29/1906.

"Pay to the order of M. Wagner $573.80, five hundred seventy-three 80/100 dollars.

Gross For Sc at 30 per bu.
Tare Hayes-Eames Elevator Co.
Net lbs. O. E. Bedell.
Net. 1A. 12 10 bus. 57654."

On the back of the instrument are the following indorsements: "M. Wagner." "A. M. Glover." And across its face is written: "Protested for nonpayment this 28th day of March, 1906. Charles Glover, Notary Public."

There was a trial to the court without the intervention of a jury. The plaintiff had judgment against the defendants the elevator company and A. M. Wagner, and they have appealed. The facts disclosed by the record are in substance as follows: At the time, and for more than five years before the instrument in suit was made, the appellant the Hayes-Eames Elevator Company was engaged in buying and shipping grain in the village of Giltner, Hamilton county, Neb., by and through one O. E. Bedell, its agent at that place. During all of that time it was the custom of the elevator company to draw its checks in payment for grain purchased, which were understood to be drawn upon the bank of Bromfield, located and doing a banking business in that village. The bank invariably paid said checks and charged them to the account of the elevator company. At the close of each day's business the agent of the company made a report of the business done, and of the checks drawn by him on the bank at Giltner, to the main office of the company at Lincoln, Neb., and in case of any overdraft he made a sight draft on the Lincoln office to cover the amount thereof. On the 28th day of February, 1906, following the usual custom, Bedell, the agent of the elevator company, drew the check in question, which in form and substance is the same as its ordinary grain check, and delivered it to M. Wagner, who immediately presented it to the bank of Bromfield, and it was paid, but not canceled. Wagner took the money received as payment of the check and deposited it in the Citizens' Bank of Giltner to the credit of the elevator company. It further appears that for some time before the issuance and payment of the check in question there was a disagreement between the elevator company and the Bromfield bank as to the state of the elevator company's account, and the company had been trying to have the bank examine and correct the discrepancy, but without success. When the check was drawn the elevator company claimed a credit at the bank of $3.10 more than the check called for, while the bank now claims that the check caused a large overdraft. It also appears that one month after the presentation and payment of the check the president of the bank delivered it to his brother, one A. M. Glover, who wrote his name on the back thereof, in turn delivered it to the plaintiff, the Aurora State Bank, and received therefor $73.80 in cash and $500 in New York exchange. The check was then sent to the plaintiff's Omaha correspondent for collection. Payment thereof was demanded of the bank of Bromfield, which was refused, the check was protested, and the plaintiff thereupon brought this action against the elevator company et al. to recover the sum named therein with interest. The trial court gave the plaintiff judgment for that amount on the theory that the check was a negotiable instrument, and notwithstanding the foregoing facts the Aurora State Bank was entitled, as a bona fide holder, to recover the amount of the check from its maker.

The defendants contend (a) that the court erred in treating the check as a negotiable instrument; (b) that when the bank of Bromfield paid the check to the person named therein its liability as maker was discharged, and such payment did not constitute the bank a holder within the meaning of the negotiable instruments act so as to enable it to again put the check into circulation, and thus render the maker liable for its payment.

In support of defendants' first assignment, our attention is directed to the first section of the negotiable instruments act. See section 9200, Cobbey's Ann. St. 1909, where among other, things, it is provided that: "Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty." It will be observed by an examination of the check in question that the name of the drawee is not indicated therein at all, and therefore it would seem that the instrument is nonnegotiable, at least in form, but we find it unneccessary to determine that question in order to properly dispose of this appeal. A similar question to the one raised by defendants' second contention was before us in Nat. Bank of Commerce v. Farmers' & Merchants' Nat. Bank of Lincoln, 128 N. W. 522. In that case a certain forged check was presented to the plaintiff, which was the drawee bank, by the defendant through the clearing house and paid without detection. Afterwards when the forgery was detected plaintiff demanded repayment of the check of the defendant bank, and upon refusal brought suit to recover the amount thereof. It was held that when the check was presented to the drawee bank and paid in due course, such payment was not a negotiation of it within the meaning of the negotiable instruments act, but was an extinguishment of the instrument. It was there said: "'An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof.' To 'negotiate' is defined in the Century Dictionary: 'To treat with another or others; * * * to arrange for or procure by negotiation; bring about by mutual arrangement, discussion, or bargaining; * * * to put into circulation by transference and assignment of claim by indorsement; as, to negotiate a bill of exchange; * * * to dispose of by sale or transfer; as, to negotiate securities.' In Words and Phrases, it is said: 'To negotiate means to conclude by bargain, treaty, or agreement; * * * transfer, to sell, to pass, to procure by mutual intercourse and agreement with another, to arrange for, to settle by dealing and management. The power to "negotiate" a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorsee or holder. "Negotiation" means the act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person.' If A. gives B. a check on C. bank, and B. presents the check at the counter of C. no negotiation is necessary or had. He simply demands and receives payment. But, if B. goes to D. store and buys a bill of goods and tenders the indorsed check in payment he negotiates the check. The difference is clear and well defined. The presentation by defendant of the check in controversy for payment was not a 'negotiation' of the check within the meaning of the statute quoted. Nor do we think that the payment by a bank of a check drawn upon it constitutes such bank a 'holder' within the meaning of the statute. * * * When a check is presented to the bank upon which it is drawn, and is paid by such bank, such payment discharges the instrument (section 118, art. 8, c. 41, Comp. St. 1909), and the bank is not thereafter, within the meaning of the statute, a 'holder' of such check."

We think the foregoing clearly disposes of the question involved in the case at bar. When the bank of Bromfield paid the check in question in the usual course, and in the absence of fraud or mistake such payment extinguished the instrument, the bank could not thereafter reissue it so as to create a liability thereon against the maker or prior indorser thereof. We are therefore of opinion that the district court erred in rendering judgment for the plaintiff and against the appellants; and as to the Hayes-Eames Elevator Company and M. Wagner that judgment is reversed and the action is dismissed; but this decision is not to be taken as an adjudication between the Hayes-Eames Elevator Company and the bank of Bromfield as to the condition or state of their disputed account. The other defendants not having appealed, the judgment of the district court, as to them, is hereby affirmed.

Judgment accordingly.

REESE, C. J., not sitting.

NOTE.—*Negotiation of a Check After its Payment by Bank on Which it is Drawn.*—It seems to us that the opinion in the principal case has discussed the question involved very narrowly. It is to be conceded very readily, that negotiation of a bill is to be taken as destroyed when it comes to the hands of the payee, but does this mean any more than to say that the payee has no power to negotiate it?

But take the facts in the principal case and it appears, that the check sued upon came to the counter of the Bromfield bank for payment and it was paid. It then should have been marked paid. But instead, the president of the bank delivered it to his brother. That brother, whether he paid value for the check or not, could not, if it were shown that he received it from the bank or knew it had come into the bank's possession, maintain an action on the check. Nor could any subsequent holder of the check, who knew that its negotiability had been ended by its having come into possession of the bank.

In this case, however, the brother, who wrote his name on the back of the check, passed it to

plaintiff bank, which paid full value, knowing nothing of its having ever been in possession of the bank on which it was drawn.

This presents a case, where there was fraud in negotiating a paper against which there was a valid defense of payment, but it was a paper which was fraudulently kept alive. It was not a forged paper of no validity whatever, but a paper against which there was a defense.

We find two older cases from Massachusetts. In one of these cases the per curiam opinion is brief. It says: "The action on the note cannot, we think, be maintained. It appears, from the evidence reported, that if Daniel Collins was ever liable, it could be in no higher capacity than as surety to Hawkes for Charles Collins; that the note was by force of the agreement, paid by the funds of Charles Collins' estate; and that when it got back into the hands of Hawkes, it was *functus officio* as a note, and could not be again put into circulation." Chapman v. Collins, 66 Mass. (12 Cush.) 163.

This language is as broad as that in the principal case, but the facts were different. In the Massachusetts case it appears that Chapman, the plaintiff, received the note from Hawkes, the payee, and in addition he was informed of all the facts in the case whereby it was claimed the note had been paid.

In a yet older case (Merrimack Bank v. Parker, 24 Mass. [7 Pick.] 88), the proof showed that a note in suit was payable to plaintiff bank; that the note was paid in part to the bank in December, 1826, and the balance in June, 1825. The latter was paid not by the principal promissor, but by another and taken away by that party, whose name he does not recall. Later the note was brought to the cashier by one Kidder, who authorized the bank to sue for his benefit, and he was asked to endorse the bank's name without recourse, which the cashier did without consulting the directors. This indorsement was the only authority given by the bank for the suit. It was contended Kidder was a *bona fide* holder. Parker, C. J., said: "The only legal inference which can be drawn from the facts reported in this case, is, that the note was paid at the bank by the principal promissor. * * * It is possible it was paid by Kidder, but there is no evidence that it was so. * * * How otherwise should he have contented himself merely with taking possession of the note and keeping it for a year, without any notice or call upon the promissors, or without any attempt to furnish himself with any evidence of transfer from the bank?" Here it is held that the rule of the note being *functus officio* applies to one who presumptively knew of payment.

There are cases which say that a promissory note once paid ceases to be negotiable, but in all of them, we think, the question came up in respect to negotiation after maturity, but in the principal case there was nothing of this kind involved. It seems to us therefore, that here is a case where there was nothing whatever to put the holder on notice, but commercial paper apparently *to be presented* in due course is offered. Negotiation of a note past due is open to all defenses. Suppose a note before due, is paid by maker? Could not a party to whom he delivers it pass it to an innocent holder who would be protected?

In 4 Am. & Eng. Encyc. Law, p. 500, it is said: "When a bill or note has been paid and taken up before maturity by the drawer or indorser, there is no question but that the payor may reissue and further negotiate it. Where, however, payment has been made before maturity by the acceptor or maker, the rights of the parties are not clear. According to the better authority, such a payment is a mere purchase and the payor may reissue the instrument before maturity, and his transferee may recover thereon against all parties to the instrument as a *bona fide* holder for value, the parties whose names appear on the instrument being bound, as though it had not passed through the hands of the maker or acceptor." If this is the rule as to a paper which appears on its face not to call for payment except at a later date, is it going much further to protect an innocent holder of a check, when the fraud upon him is accomplished by a bank, which merely violates its agreement not to mark cancelled a check which it has paid? The bank is the drawer's agent in this particular. The check is paper special between customer and bank and the customer having put it in the power of the bank to work a fraud, should be responsible for its consequences. We think where the negotiable instruments act intends paper negotiable in form to circulate freely before maturity, it necessarily intends that *bona fide* holders should be protected. See in this connection Sater v. Hunt, 66 Mo. App. 527; Fitts v. Gilmore (Tenn. Ch.) 54 S. W. 681.

C.

CORRESPONDENCE.

ROSCOE POUND ON REFORM IN PROCEDURE.

Editor Central Law Journal:

I am glad to know that you are taking up the subject of procedural reform.

Recently a judge of one of the circuit courts of Illinois, said soberly, in print that, "Illinois has as fine a system of pleading as ever existed or as does exist to-day on the globe." Perhaps the word "fine" may need definition. But if he meant that Illinois pleading is as effective an instrument for the administration of justice as any that exists, such belief on the part of a judge argues a most unhappy ignorance of what the reports and books of practice disclose to anyone who will read them.

In a recent discussion before a bar association, a justice of a state supreme court argued a satisfactory system in his own state from the number of cases the court "disposed of" annually. When we look at the last volume of the reported decisions of that court, however, we find that twenty-four of the causes reported therein were so decided that they must be tried over again. In the volume in question, twenty-two new trials are granted in actions at law, one equity cause is sent back for further proceedings, and one suit in equity is dismissed after decree because the plaintiff should have proceeded at law. In the latter, the plaintiff must now begin anew in the same court, must try the same cause once more to the same tribunal, on the same facts, but on new papers! In the twenty-two actions at law referred to, three new trials of the whole cause are granted because of errors in the damages; three are granted because of the arguments of counsel; in one the difficulty, as stated, is that a court

of law may not reform a written instrument. But observe: In that state the same court has jurisdiction at law and in equity. Hence the difficulty is that another proceeding was required, and must now go on, in the same court, collateral to the proceeding in which the new trial was granted. In that proceeding the same facts will appear and the same result will be reached as in the proceeding set aside. Causes so decided are not "disposed of." Had the learned justice been familiar with the practice in more than one jurisdiction which has outgrown the stage of procedure represented by these causes, he might have felt less satisfaction.

Above all things, there is need for more widespread knowledge of what has been done to modernize procedure. There should be more information as to what has been done and is doing to make procedure serve the ends of substantive law and of justice. Too much of our American discussion has been a priori. Too much assumes that knowledge of the local practice is a sufficient qualification for fixed opinions. If you can excite interest in bench and bar in what has been achieved at home and abroad, and induce the profession to investigate what reforms in procedure have done and hence may do elsewhere, instead of harping forever on the monstrosity which over-minute legislation has produced in New York, you will have rendered a service.

Yours very truly,

ROSCOE POUND.

Cambridge, Mass.

[We are very glad to receive this very cordial expression of approval and suggestion from Prof. Pound, a man who has probably been responsible for most of the recent agitation for reform in procedure. We are expecting further contributions on this subject before our present campaign shall end.—Ed.]

REFORM IN PROCEDURE.

To the Editor of the Central Law Journal:

Trial lawyers ought to welcome any discussion of court procedure, which will result in, or tend toward, simplification of appeals, certainty of judicial determination, inexpensive and expeditious trials, conviction of the guilty. The public has a right to expect this much of its courts and of its legislatures. And any substantial failure to meet this expectation is equivalent to failure to perform public duty.

Apropos of the foregoing observations, I may say that I am rather pleased and encouraged by the somewhat outspoken attitude of the Journal upon the much-needed subject of reform in court procedure. And your editorial in the issue of February 10, 1911, has the right ring to it. Certainly, the appellate court ought to dispose of the mooted questions of law finally, if the complete record will permit it. And, where a jury is not required, it will permit it, or can be made complete by an order requiring the return of the complete record, or bill of exceptions.

I cannot appreciate much force to the suggestion that it is of great importance to see the witnesses, where the testimony has been faithfully taken in shorthand and reproduced in longhand. Indeed, where pure questions of law only are involved, it seems to me that the bill of exceptions are adequate to meet the needs and rights of the parties to the litigation on appeal, and the ultimate decision of the appellate court ought to be final in the interest of substantial justice.

I am sure your agitation is along right lines and is much needed. I approve of it most heartily.

DUANE MOWRY.

Milwaukee, Wis.

BOOK REVIEWS.

HUGHES' EQUITY IN PROCEDURE.

A new work of considerable merit now appears over the signature of Mr. W. T. Hughes, entitled "Equity, Its Principles in Procedure, Codes and Practice Acts." The work is truly original and valuable to student and practitioner alike. Its pages are filled with valuable matter from cover to cover. Everyone interested in the struggle now going on in the profession for the improvement of the law should read it.

A copy of the book was sent to Mr. Wells M. Cook, of Chicago, for review, and Mr. Cook writes as follows:

"It has been with the greatest pleasure that I have examined the manuscript of Hughes' Equity. I am the happy possessor of all of Mr. Hughes' works, and have placed his first volume of Procedure above all in the library. All of his works are original, unique and filled with the finest matter that can be laid before a lawyer. But now I find his Equity surpasses all; it is a ne plus ultra effort. It grapples with a mighty subject, the Civil Law of Rome, and from cover to cover discloses strands of the civil law in the six leading subjects. The trilogies of these subjects are a new presentation, on a new alignment of matter, calling for new definitions and a new terminology. The preface is a presentation of fact, well drawn and forcibly presented and should be read by all jurisprudents. The demonstration it promises is executed in a lofty and masterly manner. 'From a line drawn from the orient peaks, lesser and subjective rules are left to take their places" in the light of the great and immutable principles of jurisprudence.

"An examination of 1-26 of the work will justify the foregoing conclusions. Besides these sections, section 101 and what follows shows a grasp of the higher law that I have never seen equalled. The selection of cases from Illinois and Missouri to illustrate the proposed argument in the preface, should be considered with great care. The causes of disorders in these states is clearly pointed out. These illustrations carry with them a rich citation to the Civil, the English, the Federal and best state decisions. Herefrom it is shown that codes of civil procedure have brought nothing new; its vicious construction is most clearly presented.

"The concluding chapter convincingly shows how the principles of the Civil Law have been incorporated in American jurisdictions, both state and federal. In short, the work will be accepted as a new apotheosis and a revelation of much needed and long awaited instruction. The work is attended with a wealth of citation and reference matter."

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WEEKLY DIGEST.

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16.——Property Passing to Trustee.—A contract under which bankrupts purchased a stock of goods and fixtures, providing that title to the fixtures should remain in the seller until the entire purchase price was paid, held one of conditional sale as to the fixtures, under which title did not pass to the bankrupts, who had not paid for them, although as a chattel mortgage to secure payment for the goods it was invalid for want of record.—In re Forse, 182 Fed. 212.

17.——Sale of Property.—Property of a bankrupt incumbered by mortgage liens given in good faith and duly recorded more than four months prior to the filing of the petition, should not be ordered sold by the trustee unless it appears that the liens will not be affected, and that the sale will benefit the estate.—In re Foster, 181 Fed. 703.

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27.——Presumptions.—In the absence of any definite information as to the meaning which the framers of the Constitution attached to words in a provision of the Constitution, it is fair to presume that they used the words with reference to the meaning which they had acquired in other states having the same constitutional provision.—State v. Edwards, Mont., 111 Pac. 734.

28. **Contracts**—Burden of Proving Breach.—In an action for breach of a conditional contract, the burden was on plaintiff to prove his case, though compelled to prove a negative.—Koltonski v. Electric Goods Mfg. Co., 182 Fed. 208.

29.——Construction.—It is not the function of a court of equity to supply material stipulations of a contract alleged to have been made by the parties.—Albright v. Albright, Pa., 77 Atl. 896.

30.——Performance.—Failure of the principal contractor and other subcontractors to complete the work within the time required held not to prevent the principal contractor from recovering damages from a particular subcontractor for breach of his contract to complete the work within the required time.—Sands & Oliver v. Quigg, Va., 69 S. E. 440.

31.——Rescission.—False and willful misrepresentations made with intent to deceive and induce one to make a contract he would not otherwise have made are ground for rescission, though no actual damage result.—Barnes v. Century Savings Bank, Iowa, 128 N. W. 541.

32. **Corporations**—Authority of Treasurer.—If a treasurer has been accustomed to make certain contracts for the corporation, it is bound by a new contract of that kind entered into by him.—First Nat. Bank v. American Bangor Slate Co., Pa., 77 Atl. 1100.

33.——Bonds.—Under the rule of the federal courts, any holder of negotiable bonds of a corporation secured by mortgage who acquired the same in good faith for a valuable consideration is affected only by what he actually knew, and not at all by what he might have known by the use of ordinary diligence, and this applies not only to the bonds themselves, but to the security by way of mortgage which each bond assumes to carry with it.—Central Trust Co. of New York v. Bodwell Water Power Co., 181 Fed. 735.

34.——Liability of Stockholder.—In an action to enforce further liability of a stockholder, on the ground that the stock was issued for property at an overvaluation, held, that there was no debt due for which attachment would lie until the stockholder's liability was ascertained.—Gilson v. Appleby, N. J., 77 Atl. 1084.

35.——Rights of Minority Stockholders.—An objecting minority stockholder in a corporation selling its property and franchises held not compelled to take in exchange for his stock bonds of the purchasing company.—Koehler v. St. Mary's Brewing Co., Pa., 77 Atl. 1016.

36.——Trespass.—Where the president of a corporation committed a trespass on plaintiff's land and cut timber therefrom, he and the corporation were jointly liable.—Lytle Logging & Mercantile Co. v. Humptulips Driving Co., Wash., 111 Pac. 774.

37.——Visitorial Power of State.—The state held authorized to exercise visitorial powers over foreign corporations doing business in the state, to enable it to ascertain whether the laws have been violated by such corporations.—Cumberland Telephone & Telegraph Co. v. State, Miss., 53 So. 489.

38. **Covenants**—Quiet Enjoyment.—A covenant of quiet enjoyment is not broken until eviction.—Roake v. Sullivan, 125 N. Y. Supp. 835.

39. **Criminal Law**—Evidence Wrongfully Obtained.—Testimony that accused put on a blouse, and that it fitted him, is not inadmissible as a violation of the protection against self-incrimination afforded by U. S. Const. Amend. 5.—Holt v. United States, 31 Sup. Ct. 2.

40.——Jury.—If the jury was exposed to improper influences, which might have produced

the verdict, the presumption of law is against its purity.—Green v. State, Miss., 53 So. 415.

41.——Physicians.—Where a physician is sent to a jail to examine a prisoner's mental and physical condition, the prisoner is not thereby compelled to furnish evidence against himself, and the physician may testify as to the prisoner's condition.—People v. Austin, N. Y., 93 N. E. 57.

42.——Sealed Verdict.—The sealed verdict of a jury may on their returning into court be corrected by them in form, and then received as their verdict.—People v. Duffek, Mich., 128 N. W. 245.

43. **Damages**—Breach of Contract.—In an action for breach of a contract to locate a railroad station at a certain point, damages from depreciation in the value of adjacent land held not recoverable.—Atlanta & St. A. B. Ry. Co. v. Thomas, Fla., 53 So. 510.

44.——Breach of Contract.—The rule that on every breach of contract the other party has a right to recover nominal damages does not apply, where only punitive damages are sued for and are not recoverable.—Hadden v. Southern Messenger Service, Ga., 69 S. E. 480.

45. **Descent and Distribution** — Liability of Heirs.—An heir cannot be charged with the debts of his ancestors, unless assets have been received by the heir to the amount of the judgment representing the debts.—Sawyer v. Platt, N. J., 77 Atl. 1043.

46.——Real Estate.—Title to real estate descends at death of owner to his heirs subject to administration and the contingency of a will.—Brown v. Webster, Neb., 128 N. W. 635.

47. **Discovery**—Examination Before Trial.—A resident of Vermont, suing a citizen of New York in the state, will be required to obey an order for his examination before trial on service of notice on his attorneys before being permitted to try the case.—Balestier v. Tribune Ass'n., 125 N. Y. Supp. 845.

48. **Easements**—Creation. — Where a user originates by permission, an easement cannot be acquired by continued user, unless by some subsequent occurrence it becomes hostile, and thus adverse.—Baynard v. Every Evening Printing Co., Del., 77 Atl. 885.

49. **Ejectment**—Evidence of Title.—A deed from a grantor not appearing to have had either title or possession is not evidence of title.—Trustees of Caledonia County Grammar School v. Kent, Vt., 77 Atl. 877.

50. **Electricity**—Defectively Insulated Wire.—Electric light company held liable to boy injured on climbing into a tree by a defectively insulated electric light wire.—Mullen v. Wilkes-Barre Gas & Electric Co., Pa., 77 Atl. 1108.

51. **Eminent Domain**—Property for Private Use.—The state cannot authorize the taking of private property for private use against the will of the owner.—Doty v. Village of Johnson, Vt., 77 Atl. 866.

52. **Equity**—Pleading.—In federal courts of equity, the rule is established that a demurrer to a whole bill must be overruled if the bill, taken altogether, entitles complainant to some kind of relief.—St. Louis & S. F. R. Co. v. Allen, 181 Fed. 710.

53. **Estoppel**—Equitable Estoppel.—The doctrine that an owner of land may by an act in pais preclude himself from asserting his legal title can only be applied on the disclosure of clear and satisfactory grounds of justice and equity, and the evidence establishing the alleged estoppel must be clear and satisfactory.—Urquhart v. Belloni, Or., 111 Pac. 692.

54.——National Banks.—Officers of a national bank may not hold themselves out to the Comptroller of the Currency, the bank examiners, and the business public as original subscribers for and holders of its capital stock, which they have never paid for, and yet escape liability on obligations given for such stock by a secret agreement among them that the stock shall be considered as belonging to the bank, and not to the one to whom it is issued.—Lyons v. Westwater, 181 Fed. 681.

55. **Evidence**—Declarations of Deceased.—Declarations of a deceased adjoining owner as to the location of his corner, if against his interest, held admissible on the issue of the location of the boundary line, otherwise, not.—Chrisco v. Yow, N. C., 69 S. E. 422.

56. **Federal Courts**—Appeal from District Court.—Jurisdiction of federal supreme court of direct appeal from the federal district court in admiralty dismissing a libel for contribution cannot be defeated on the theory that the dismissal was really on the merits.—Lehigh Valley R. Co. v. Cornell Steamboat Co., 31 Sup. Ct. 17.

57.——Concurrent Jurisdiction.—The federal circuit court for the district of Nevada and the California state courts have concurrent jurisdiction to determine rights of parties claiming, the one in Nevada and the other in California, waters of an interstate stream.—Rickey Land & Cattle Co. v. Miller & Lux, 31 Sup. Ct. 11.

58. **Fire Insurance**—Parol Contract.—Insurance policies may be issued or renewed by parol contract.—Benner v. Fire Ass'n of Philadelphia, Pa., 78 Atl. 44.

59. **Forcible Entry and Detainer**—Peaceable Possession.—Rightful owner gaining possession of land forcibly may be deprived of it by statutory proceedings of one in actual peaceable possession.—Schwinn v. Perkins, N. J., 78 Atl. 19.

60. **Forgery**—Indictments.—In indictments for forgery or for uttering or publishing forged instruments, it was necessary at common law to allege the name of the person intended to be defrauded.—State v. Weaver, Iowa, 128 N. W. 559.

61. **Frauds, Statute of**—Contracts of Purchase.—A contract purchaser's interest in land conveyed in escrow held reasonable by an oral agreement on his default in payment, notwithstanding the statute of frauds.—Wilcox v. Scallon, Wis., 127 N. W. 1007.

62. **Fraudulent Conveyances**—Actual Fraud.—If a conveyance of realty was actually fraudulent as to the rights of creditors, it was properly set aside, though the grantees paid the full value of the property.—Mathews v. Converse, Conn., 77 Atl. 961.

63. **Homestead**—Mortgage.—Where a mortgage covering homestead and nonhomestead property was held fraudulent as to the nonexempt property in bankruptcy proceedings, the holder of the mortgage thereby complied with a representation made to the mortgagor that the homestead would not be used until the other property had been exhausted.—Huttig Mfg. Co. v. Burhans, Iowa, 127 N. W. 991.

64. **Homicide**—Use of Deadly Weapon.—Use of deadly weapon is not such conclusive evidence of specific intent to kill that the court may pronounce the intent established as matter of law.—Commonwealth v. Chapler, Pa., 77 Atl. 1013.

65. **Husband and Wife**—Contracts of Married Woman.—The promise of a married woman to pay for goods purchased by her under a contract void under the law in force at the time, held not enforceable unless supported by a legal consideration.—Lyell v. Walbach, Md., 77 Atl. 1111.

66. **Indictment and Information**—Caption.—The caption of an indictment may be wholly omitted without affecting its validity.—State v. Smith, Iowa, 127 N. W. 988.

67. **Insurance**—Duty of Members.—Members of mutual benefit association are bound to take notice of its charter powers and of the laws of the state under which it is organized.—Southern Mut. Aid Ass'n. v. Cobb, Fla., 53 So. 505.

68. **Interstate Commerce**—Power of States.—While the states may enact valid legislation incidentally affecting interstate commerce in many ways, when Congress has acted in any matter pertaining to the regulation of such commerce, no state can by legislation interfere with burden, or control it.—St. Louis & S. F. R. Co. v. Allen, 181 Fed. 710.

69. **Joint Tenancy**—Creation.—Where there is no direct evidence of intent with reference to the joint ownership of property, presumptions are admissible.—In re Kaupper, 125 N. Y. Supp. 878.

70. **Judgment**—Conclusiveness.— A judgment is conclusive not only upon those who are actual parties to the litigation, but also upon those who are in privity with them.—Walzl v. King, Md., 77 Atl. 1117.

71.——Laches.—One sued may assume that no different judgment will be taken against him by default than that warranted by the facts alleged, until actual or constructive notice to the contrary.—Anderson v. Burgoyne, Wash., 111 Pac. 777.

72. **Landlord and Tenant**—Breach of Lease by Tenant.—Where a tenant vacates the premises before termination of his lease, the landlord owes the duty to rent them in diminution of the tenant's damages.—Zabriskie v. Sullivan, N. J., 77 Atl. 1075.

73. **Licenses**—Revocability.—At law a license cannot create or transfer any interest in land, and it is revocable, though granted for a valuable consideration.—Baynard v. Every Evening Printing Co., Del., 77 Atl. 885.

74. **Liens**—Personal Property.—At common law either actual or constructive possession is essential to support a lien upon personal property.—Thourot v. Delahaye Import Co., 125 N. Y. Supp. 827.

75. **Life Insurance**—Assignment of Interest. —An assignment with warranty of a wife's interest in her husband's life insurance policy consented in writing by him held to pass her interest to the assignee, though she died before her husband.—Henry v. Thompson, N. J., 78 Atl. 14.

76. **Limitation of Actions**—Filing of Defective Complaint.—The filing of a complaint defective only in that it is neither signed by plaintiff nor his attorney tolls the running of limitations.—Canadian Bank of Commerce v. Leale, Cal., 111 Pac. 759.

77. **Malicious Prosecution**—Obedience to Injunction.—Where the want of authority to issue an injunction did not appear on the face of the writ, the fact that one obeyed the mandate did not preclude him from suing for malicious prosecution based on the issuance of the injunction.—Kryszke v. Kamin, Mich., 128 N. W. 190.

78. **Marshaling Assets and Securities**—Rights of Subsequent Lienors.—Where a prior lienor has more funds or property subject to his lien than a subsequent lienor has, the former if required, must, as respects the latter, first exhaust his right against that fund or property on which the latter has no lien.—Collerd v. Tully, N. J., 77 Atl. 1079.

79. **Master and Servant**—Assumed Risk.—A servant does not assume the risk unless he not only knows thereof, but also appreciates the danger.—Stewart v. Pittsburg & Montana Copper Co., Mont., 111 Pac. 723.

80.——Assumption of Risk.—A servant does not assume the risk attending the breach of a statutory duty by his master, though he may nevertheless be guilty of conduct contributory to his injury.—Rivers v. Bay City Traction & Electric Co., Mich., 128 N. W. 254.

81.——Promise to Repair Premises.—Where a master's promise to repair induces the servant to continue in the employment, he may recover for injuries received within a reasonable time, unless the danger is so imminent that no reasonably prudent man would continue in the service.—Harris v. Bottum, Vt., 77 Atl. 945.

82.——Right to Profits.—A court cannot either at law or in equity as remuneration for an employe's successful management divide the business or profits between the employe and his employer.—Albright v. Albright, Pa., 77 Atl. 896.

83. **Mechanics' Liens**—Persons Entitled.—That a subcontractor furnishing materials and labor in the construction of a building did not personally bestow labor or services on the building will not preclude him from obtaining a mechanic's lien therefor.—Barrett-Hicks v. Glas, Cal., 111 Pac. 760.

84. **Mines and Minerals**—Claims.—Where several mining claims are held in common and are contiguous, the assessment work may be done on any one of them or on adjacent patented land or on public land, if it tends to develop the claims.—Anvil Hydraulic & Drainage Co. v. Code, 182 Fed. 205.

85. **Mortgages**—Assignment.—An assignee of a mortgage takes it subject to the defense that the debt has been paid, though not discharged of record.—Hendricks v. Hess, Minn., 127 N. W. 995.

86.——Foreclosure.—A party to a mortgage foreclosure proceeding is not as a matter of law entitled to notice of the time and place of the sale.—Ring v. New Auditorium Pier Co., N. J., 77 Atl. 1054.

87.——Foreclosure.—In a suit to foreclose a mortgage given for purchase money, breach of covenant of seisin in the deed to the mortgagor may be set up as a defense.—Roake v. Sullivan, 125 N. Y. Supp. 835.

88. **Municipal Corporations**—Lighting Plants. —The authority given to "establish" a lighting plant held to authorize the city to "purchase" a lighting plant.—Hurd v. City of Fairbury, Neb., 128 N. W. 638.

89.——Public Streets.—The presumption that a public street is safe for ordinary travel applies only to those who have no knowledge or reasonable means of knowledge that it is unsafe.—Solomon v. Philadelphia, B. & W. R. Co., Del., 77 Atl. 970.

90.——Ratification of Unauthorized Act.—A municipal corporation may ratify the unauthorized contracts of its agents or officers which are within the scope of corporate power.—Aspinwall-Delafield Co. v. Borough of Aspinwall, Pa., 77 Atl. 1098.

91. **Negligence**—Action for Death of Child.— A parent is only required to exercise ordinary care in watching and controlling his child.—Tecker v. Seattle R. & S. Ry. Co., Wash., 111 Pac. 791.

92.——Pleading.—In an action for personal injuries, plaintiff set out two distinct acts of negligence. Held, that on trial, he could win by proving only one act of negligence and the other material allegations of his complaint.—South Bend Brick Co. v. Goller, Ind., 93 N. E. 37.

93. **Nuisance**—Injunction. — A business may become a nuisance, where it is not conducted with due regard to the rights of surrounding property owners and renders the enjoyment of their property impossible.—Nowak v. Baier N. J., 77 Atl. 1062.

94. **Payment**—Burden of Proof.—Where plaintiff has proved the existence of a debt sued on, at least within the period of statutory limitations, the burden of proving payment is on defendant.—Barrett-Hicks Co. v. Glas, Cal., 111 Pac. 760.

95. **Pleading**—Contributory Negligence.—Contributory negligence must affirmatively appear on the face of the complaint to justify the sustaining of a demurrer thereto on that ground.—Grand Trunk Western Ry. Co. v. Poole, Ind., 93 N. E. 26.

96. **Principal and Agent** — Authority of Agent.—The authority of an agent must have its source in the intention of the principal expressly shown or shown by necessary implication.—Hale v. Goodell, Colo., 111 Pac. 708.

97. **Principal and Surety**—Discharge of Surety.—A surety on a building contractor's bond for the construction of a one-story building was discharged by changes in the plans, involving the addition of another story, where he did not consent thereto.—Barrett-Hicks Co. v. Glas, Cal., 111 Pac. 760.

98.——Fraud.—The concealment by the creditor of facts affecting the surety's liability so as to amount to a fraud upon him will vitiate the suretyship agreement, though it be made upon sufficient consideration.—Barnes v. Century Savings Bank, Iowa, 128 N. W. 541.

99. **Public Lands**—Rights of Patentees.—It is not until the United States has parted with its legal title to public lands that the equities subject to which the patentee holds the title may be enforced by the courts.—Hall & Legan Lumber Co. v. Jeter, La., 53 So. 533.

100. **Railroads**—Eminent Domain. — A railroad company proceeding to tear up a street at night and construct its road therein, without any authority, held a trespasser ab initio, and an abutting owner may enjoin the use of the street.—State v. Superior Court of Benton County, Wash., 111 Pac. 787.

101.——Injury to Passengers.—If street car operatives knew that a passenger was standing, it was their duty to operate the car so as not to throw her off irrespective of the reasons causing her to arise.—Winona & W. Ry. Co. v. Rousseau, Ind., 93 N. E. 34.

102.——Torts of Servant.—Railroad company held not liable for malicious assault committed by a policeman in its employ.—Berryman v. Pennsylvania R. Co., Pa., 77 Atl. 1011.

103. **Reformation of Instruments**—Mistake.—A party seeking to reform a contract on the ground of mistake must show a mistake in the written instrument, and show, beyond a reasonable doubt, a standard to which the writing can be reformed.—Fife v. Cate, Vt., 77 Atl. 947.

104. **Sales**—Partial Rescission.—A seller, accepting an offer by the buyer to return goods bought, held entitled to sue for conversion on the buyer refusing to surrender possession on demand.—Gottlieb v. Peck & Mack Co., 125 N. Y. Supp. 829.

105. **Specific Performance**—Contract for Sale of Real Estate.—A contract for the sale of real estate executed by a husband alone, though his wife was mentioned in the body thereof, held enforceable against the wife because of part performance by the purchaser.—Stenson v. Elfmann, S. D., 128 N. W. 588.

106.——Parol Gift of Land.—Equity will protect a parol gift of land followed by possession and permanent valuable improvements.—Whitaker v. McDaniel, Md., 78 Atl. 1.

107. **Street Railroads**—Frightening Horses.—A street car company held not liable for injuries caused by frightening a horse driven through a country district.—Effinger v. Ft. Wayne & W. V. Traction Co., Ind., 93 N. E. 32.

108.——Ordinance Requiring Fenders.—A city ordinance requiring street cars to be equipped with a fender held reasonable.—Tecker v. Seattle R. & S. Ry. Co., Wash., 111 Pac. 791.

109. **Sunday**—Amusements.—Laws relating to Sunday performances of theaters and playhouses are laws passed in the exercise of the police power for the promotion of the public peace, order and morals.—State v. Penny, Mont., 111 Pac. 727.

110. **Taxation**—Assessments.—A foreign corporation executing a mortgage held not entitled to complain of the action of the State Board of Tax Commissioners in determining the value of the mortgaged real estate within the state.—People v. State Board of Tax Com'rs, 125 N. Y. Supp. 843.

111.——Assessments.—The assessor must fix value of property for taxation, and where different adjacent tracts or joint assessments of land include lands of different values, the assessor must specify it; but, where he does not, his failure to do so does not avoid the assessment.—North v. Culpepper, Miss., 53 So. 419.

112.——Equality.—To tax all property equally, it is necessary to value it by the same standard.—Boston & M. R. R. v. State, N. H., 77 Atl. 996.

113.——Railroad Property.—The actual value of railroad property not producing an income, and not the cost of reproduction, is the true basis for the taxation thereof.—People v. State Board of Tax Com'rs, 125 N. Y. Supp. 895.

114.——Special Franchises.—A patent by the state of a right of way under a river held a grant of an easement, and not of the fee and taxable as a special franchise.—People v. State Board of Tax Com'rs, 125 N. Y. Supp. 895.

115. **Trade-Marks and Trade-Names**—Fraud.—On the use by defendant of a trade-name similar to that used by plaintiff for 15 years, fraud is presumed, and need not be affirmatively shown.—Northwestern Knitting Co. v. Garon, Minn., 128 N. W. 288.

116.——Geographical Names.—No exclusive use in a geographical name as a trade-name can be acquired.—Pocono Pines Assembly v. Miller, Pa., 77 Atl. 1094.

117.——Right Not Limited to Single Name.—A manufacturer may be protected in the use of as many separate trade-marks as he first adopts and continuously uses, so that they clearly become to purchasers distinguishing marks of the goods he makes or sells.—Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 24.

118. **Trespass**—Acts Constituting.—A person who cuts down or has cut down trees which belong to him and an adjoining owner is guilty of trespass, whether he makes entry upon the land of such owner or not.—Phillips v. Brittingham, Del., 77 Atl. 964.

119. **Trial**—Special Interrogatories.—Special interrogatories submitted to a jury should be so framed as to admit of a direct answer.—Grand Trunk Western Ry. Co. v. Poole, Ind., 93 N. E. 26.

120. **Vendor and Purchaser**—Bona Fide Purchasers.—The possession of land and exercise of acts of ownership by making improvements, etc., placed third persons upon inquiry as to the nature and extent of the possessors' rights.—Carthage Tissue Paper Mills v. Village of Carthage, N. Y., 93 N. E. 60.

121.——Bona Fide Purchasers.—Where certain deeds of record show that provisions were made for easements in an alley, and an examination of the premises would have shown the alley in actual use, the subsequent purchaser of adjacent property is charged with notice of such easement.—Imperial Realty Co. v. West Jersey & S. R. Co., N. J., 77 Atl. 1041.

122.——Mutual Rescission.—An executory contract for the sale of land may be mutually rescinded by the parties.—Miles v. Hemenway, Or., 111 Pac. 696.

123.——Title of Vendor.—A purchaser in a contract for sale of real estate which provides for a good title may demand a title free from litigation, palpable defects, or grave doubts.—Snowden v. Derrick, Cal., 111 Pac. 757.

124. **Wills**—Construction.—An erroneous recital by testator that two of his children would receive the proceeds of a policy of insurance upon his life "under and by virtue of said policy" held not to operate as a bequest by implication.—Smith v. Smith, Md., 77 Atl. 975.

125.——Mental Capacity.—In a suit to revoke a will for testamentary incapacity, much latitude should be allowed in showing the condition of testator prior or subsequent to the execution of the will.—Taylor v. Taylor, Ind., 93 N. E. 9.

126.——Testamentary Capacity.—The opinion of a witness as to testamentary capacity of a person must be confined to his mental condition at the time of the execution of his will.—Grill v O'Dell, Md., 77 Atl. 984.

127.——Undue Influence.—Undue influence in the execution of a will may be exerted to prevent the detection of fraud, and may amount to fraud, if strong enough to secure the provisions desired.—Cooper v. Harlow, Mich., 128 N. W. 259.

128. **Witnesses**—Physicians. — A physician who never attended a party in a professional capacity, nor obtained information from him in such capacity, held competent to testify the same as any other witness.—People v. Austin, N. Y., 93 N. E. 57.

129.——Privileges.—A witness cannot refuse to answer a relevant question on the ground that the answer will tend to establish a debt or subject him to a civil suit or result in pecuniary loss.—Boston & M. R. R. v. State, N. H., 77 Atl. 996.